LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 23 1972

No. 71-1215

In the Supreme Court of the United States

OCTOBER TERM, 1971

GARY RICHARD TIGERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

INDEX

CITATIONS

Cases:

	Page
Dickinson v. *United States*, 346 U.S. 389	8
Gruca v. *Secretary of Army*, 436 F. 2d 239, certiorari denied, 401 U.S. 978	10
McGee v. *United States*, 402 U.S. 479	9
Selby v. *United States*, 250 F. 2d 666	10
United States v. *Coffey*, 429 F. 2d 401 (C.A. 9)	10
United States v. *Evans*, 425 F. 2d 302, certiorari denied, 402 U.S. 987	10
Uffelman v. *United States*, 230 F. 2d 297	10
Witmer v. *United States*, 348 U.S. 375	8, 10

Statutes:

50 U.S.C. App. 462(a)	1

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1215

GARY RICHARD TIGERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of willful refusal to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to imprisonment for one year and one day. The court of appeals affirmed (Pet. App. A).

Petitioner's refusal to report for induction followed a protracted series of proceedings before his local

board which resulted in the rejection of his claim for classification as a conscientious objector. The defense to this prosecution and petitioner's principal argument here is that the local board's denial of his claim was without any basis in fact.

Petitioner registered with his local board on January 11, 1966 (SSF 1), and submitted his Classification Questionnaire (SSS Form 100) on March 22, 1966 (SSF 4). The completed questionnaire revealed that petitioner had been rejected for enlistment in the Air National Guard in September 1965 because he was underweight (SSF 8) and that petitioner was not claiming exemption as a conscientious objector (SSF 7). On June 8, 1966, petitioner was classified 1-A (SSF 11).

On June 22, 1966, petitioner advised his local board by letter that he was applying to the Royal Academy of Dramatic Arts in England and asked whether full-time attendance at the school would entitle him to a student deferment. The local board responded that it would be necessary for petitioner to submit verification of his acceptance at the school prior to any local board action. Petitioner then enrolled at San Fernando Valley State College during the 1966-1967 school year (SSF 21-22) but apparently discontinued his enrollment sometime during or after completing his first year in June 1967 (SSF 22, 47, 122).

On March 1, 1967, petitioner requested the Special Form for Conscientious Objectors (SSS Form 150) which he completed and returned on March 10, 1967 (SSF 25). Petitioner claimed that by reason of his

religious belief and training he was conscientiously opposed to participation in war in any form. Explaining the nature of his belief, petitioner stated (SSF 25, 29):

> I believe in a perfect, spiritual entity embodying and expressing the absolutes of Truth and Love as I have been taught to understand them from childhood. It is to this ideal that I constantly refer and pattern my actions on. That is, I try to live up to my highest sense of good as epitomized by the Supreme Being. This is my first and only duty. If I can keep my mind thus concentrated on Principle, I will be better able to find the best answers to any moral questions arising from human relations. "Seek ye first the kingdom of God and all these things will be added unto you" LUKE 12:31. My highest sense of good condemns war and forbids my participation in it.

In explaining "how, when, and from whom or from what source [he] received the training and acquired the belief" which is the basis of his claim, petitioner stated that he had been raised in a Christian Science home and attended Sunday School "since earliest childhood." Petitioner stated further that his parents "as [sic] Sunday School teachers" and the writings of Mary Baker Eddy had been instrumental in instilling in him "abhorence of violence and the immorality of reversion to war in order to settle differences" (SSF 26, 29). Petitioner also cited examples in his life, going back to childhood, which conspicuously demonstrated the consistency and depth of his religious convictions (SSF 26).

Petitioner made no effort to reconcile his attempted enlistment in the Air National Guard with his belief which he now claimed to have been instilled in him during childhood. A number of letters from friends and family attesting to petitioner's sincerity were also submitted to the local board (SSF 30-35). Petitioner's father wrote the local board that, on the basis of "soul searching conversations" with his son, it was clear that petitioner was not a pacifist but opposed killing over political and ideological differences. Petitioner would view violence in defense of himself, his neighbor or a defenseless party as necessary but not justified (SSF 34). While this and the other letters attested to the sincerity of petitioner's objection to war, none of the letters spoke of petitioner's religious training and belief, despite the fact that this belief was the basis upon which petitioner's abhorence of violence assertedly rested.

On May 10, 1967, petitioner appeared for a preclassification interview (SSF 35). When asked by the local board how long he had adhered to his professed religious beliefs against violence, petitioner said about six months but explained that "he's never had these problems presented to him where I had to face them" (SSF 34). Petitioner did not explain why the problem had not been presented when he attempted to enlist in the Air National Guard after the introduction of American ground combat forces in Vietnam.

On May 25, 1967, petitioner was classified 1-A and requested a personal appearance before the local

board. Petitioner again reiterated his position, based upon his religious beliefs, in opposition to violence. But contrary to his earlier interview, when he indicated that he would support the defense of life and property against attack (SSF 35), petitioner stated he would put up no defense if his house was invaded because "he does not hold his property as being something he would fight for, and further said he does not find his sense of security in being defended or in physical strength but only in principle" (SSF 42).

The local board then classified petitioner as 1-A. After a physical examination, in which he was found fit for service (SSF 52), petitioner addressed a letter to the local board setting forth a collection of excerpts from religious works "which have been a source of much soul searching and ultimately of inspiration" (SSF 53).

Petitioner was ultimately ordered to report for induction after unsuccessfully appealing his classification within the Selective Service System. Although petitioner refused induction, the United States Attorney declined prosecution on the ground that there was no basis in fact for the denial of petitioner's classification (SSF 75).[1]

Petitioner was again invited to appear for another preclassification interview which took place on September 11, 1968. A number of letters from friends and family were again submitted and petitioner also

---

[1] The local board had not stated any reasons for its denial of petitioner's claim for conscientious objector classification (SSF 43).

submitted a long written statement, apparently in an effort to reconcile his claim that his religiously grounded beliefs against violence had been inculcated during childhood with his unsuccessful effort at enlistment and his statement to the board that he had held these beliefs for only six months (SSF 83).

Petitioner explained that prior to his freshman year at Valley State College in September 1966, he did not know exactly what a conscientious objector was nor did he consider risking his career and a normal happy life by refusing induction or facing imprisonment. But he said his first year at Valley State College, "agonizing and exciting and filled with questions," was the turning point. It was then that he began to mature, understand the significance of his own behavior and understand what ethics and morality were all about. Although personally safe from induction because of his studies, he became committed to understanding the true nature of war (SSF 83):

> Suddenly, the seeds of religious education that were laying largely dormant burst and grew in meaning. I read and re-read all that I could find in the church literature, in Emerson, Thoreau and ghandi's [sic] works to expose the reality of the issues at stake: the issues of "What is the relationship of man to his fellow man and what is man's relationship to God?" In quiet reflection as well as in emotional discussion the answers and the implication of those answers became evident. It is immoral to kill. * * *

After the hearing which followed the submission of the written statement, the local board declined to reopen the classification and found that petitioner did not qualify for 1-O classification because "his beliefs [were] philosophical, he does not attend religious services or functions and by his own admission was not a conscientious objector prior to the year 1966, when he was classified 1-A" (SSF 86). Petitioner was then ordered to report for induction and again the United States Attorney declined prosecution after petitioner failed to comply. The United States Attorney requested the local board to reopen the case and give petitioner an opportunity to submit further information (SSF 100). On February 12, 1970, petitioner was advised that he was removed from delinquency status and classified 1-A. Petitioner then requested a personal appearance, concluding his request "Love Gary" (SSF 104).

Again after this personal appearance on May 13, 1970, the local board unanimously voted to classify petitioner 1-A (SSF 108). The local board stated that it was "unanimous in finding the registrant not sincere in his religious beliefs." The local board further noted (SSF 108):

> It has been noted that all previous board action also supports this belief and every effort was made to hear the registrant with open minds. Registrant in his deportment, appears to be playing a game of wits in opposition to selective service regulations. After his sarcastic presentation in the board room he was seen and heard, by the board secretary, councelling [sic]

with waiting registrants. Registrant is not sincere.*

Petitioner's file was then forwarded to the State Appeal Board which classified petitioner I-A on August 6, 1970 (SSF 110). Petitioner was ordered to report for induction on September 8, 1970. Petitioner complied with the order to report but refused induction, and his indictment, trial and conviction followed.

1. Petitioner contends here, as he did below, that there is no basis in fact for the local board's finding of insincerity and the denial of his conscientious objector claim. The argument was properly rejected by the court of appeals.

The ultimate question in conscientious objector cases "is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form." *Witmer* v. *United States*, 348 U.S. 375, 381. Any fact which casts doubt on the veracity of the registrant is relevant. It is "affirmative evidence * * * that a registrant has not painted a complete or accurate picture * * *". *Dickinson* v. *United States*, 346 U.S. 389, 396, *Witmer* v. *United States*, 348 U.S. at 382. The record in this case before the board contains words and acts which cast doubt on the veracity of petitioner's claim.

Petitioner's initial request for a conscientious objector classification made it plain that his beliefs, which were rooted in his religious background, were molded and instilled in childhood and reflected by examples in his life (SSF 26). Yet petitioner admitted to the local board that he held his beliefs for

only six months prior to making his claim. Petitioner attempted to explain this inconsistency initially by stating that "these problems" had never been presented to him "where [he] had to face them" (SSF 34). But petitioner failed to explain why "these problems" were not presented when he sought to enlist in the Air National Guard Reserve.

Again, perhaps recognizing the inconsistencies in his position, petitioner sought to attribute his apparently new found beliefs to his first year at Valley State College, described by him as "agonizing and exciting and [full of] questions," which caused "the seeds of his religious education that were laying largely dormant" to blossom (SSF 83). The argument that his religious beliefs "were dormant" is not wholly consistent with the examples of the behavior in petitioner's life which he had earlier cited as most conspicuously demonstrating the consistency and depth of his religious convictions.

The decision to grant a conscientious objector exemption depends on the application of expertise by administrative bodies in resolving underlying issues of fact. "[F]act-finding for purposes of Selective Service classification is committed primarily to the administrative process, with very limited judicial review to ascertain whether there is a 'basis in fact' for the administrative determination." *McGee* v. *United States*, 402 U.S. 479, 486. In the present case, the inconsistencies in petitioner's words and actions along with other inconsistent statements re-

garding the nature of his convictions,[2] as well as petitioner's attitude and deportment at his final interview, which were noted by the local board (SSF 107-108), provide a sufficient basis in fact for the board's finding of insincerity here. *Witmer* v. *United States*, *supra*; *Gruca* v. *Secretary of the Army*, 436 F. 2d 239 (C.A.D.C.), certiorari denied, 401 U.S. 978; *United States* v. *Coffey*, 429 F. 2d 401 (C.A. 9); *United States* v. *Evans*, 425 F. 2d 302 (C.A. 9), certiorari denied, 402 U.S. 987; *Selby* v. *United States*, 250 F. 2d 666 (C.A. 9).

2. Petitioner further contends that the decision of the local board not to hear witnesses proffered in support of his claimed exemption requires a reversal of his conviction. At the time petitioner made his request to present witnesses, all but two of those persons offering testimony had previously submitted written information to the board in support of petitioner's exemption. Moreover, petitioner was afforded a further opportunity prior to his final meeting with the board to submit the written statement of those or other witnesses (SSF 106), which he did not do. The decision of the local board to adhere to 32 C.F.R. 1624.1(b) and permit only written statements of witnesses was within its discretion and does not warrant reversal of his conviction. *United States* v. *Evans*, 425 F. 2d 302 (C.A. 9), certiorari denied, 402 U.S. 987; *Uffelman* v. *United States*, 230 F. 2d 297 (C.A. 9).

---

[2] Petitioner retracted his statement with respect to his willingness to support the defense of life and property (SSF 35, 42).

This is a troubling case, as is evidenced by the opinions in the court below. It does not appear to involve any uncertain questions of law and there does not appear to be any basis to improve upon the handling of the facts by the court of appeals. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 466403 762